No. 09-1374

JUL 2 3 2010

In The
Supreme Court of the United States

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,

Petitioners,

v.

LOGAN T. JOHNSTON, III,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONERS

The Petition for Certiorari demonstrates that a clear circuit split on the availability of emotional distress damages for violations of the automatic stay under 11 U.S.C. § 362(h), now § 362(k)(1),[1] has resulted in dozens upon dozens of sharply divergent reported decisions by bankruptcy courts all over the country. This is a problem of real concern, with creditors in the current avalanche of bankruptcy filings facing liability for emotional distress damages in some bankruptcy courts and not others. Federal bankruptcy law is not being uniformly interpreted, and direction by this Court is sorely needed. Nothing in the Brief in Opposition ("BIO") calls any of this into question.

1. Contrary to Respondent's Contention, The Question Presented Was Pressed And Passed On Below.

For an issue to be properly presented for Supreme Court review, it must have been "'pressed or passed upon below.'" *See Verizon Communs., Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). The rule

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[1] As noted in the Petition, Section 362(h) of the Bankruptcy Code was renumbered as Section 362(k)(1) but otherwise unchanged in 2005. Pub. L. No. 109-8 § 305(1)(B), (C) (2005). The actions at issue took place before the amendment. To avoid confusion, Section 362(h) is used for all section references in this Reply as in the Petition.

"operates . . . in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41. "It is enough for certiorari that the petition addresses a rule that formed a foundation for the court of appeals decision." 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4036, at 50 (2007).

The Ninth Circuit expressly rejected Petitioners' challenge to the award of emotional distress damages, relying squarely on its recent holding in *In re Dawson*, 390 F.3d 1139 (9th Cir. 2004). It said:

> While Sternberg also argues that the bankruptcy court's emotional distress award was an abuse of discretion, this issue does not merit a lengthy discussion. Each of Sternberg's arguments is foreclosed by *Dawson*. . . .

Sternberg v. Johnston, 595 F.3d 937, 943, n.1 (9th Cir. 2010).

Dawson held categorically that "the 'actual damages' that may be recovered by an individual who is injured by a willful violation of the automatic stay . . . include damages for emotional distress." 390 F.3d at 1148. *Sternberg* expressly reaffirmed *Dawson* as the basis for affirming the award of such damages here. That is hardly surprising given that a three-judge panel of the Ninth Circuit cannot overrule another panel. *See United States v. Mayer*, 560 F.3d 948, 964 (9th Cir. 2009). Thus, the panel clearly "passed upon" the issue presented. *Cf. Citizens*

United v. Fed. Election Comm'n, 130 S. Ct. 876, 892-93 (2010) (addressing issue even though lower court "did not provide much analysis . . . because it could not ignore the controlling Supreme Court" precedent).

The Ninth Circuit's reaffirmation of *Dawson* came in response to Sternberg's consistent claim that "it was error to award *any* damages for emotional distress." *See* Appellant's Opening Brief, *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010) (No. 08-15721), 2008 WL 413394, at *23 (emphasis added). As Johnston concedes, seeking an avenue on which to prevail even in the face of *Dawson*, Sternberg argued that emotional distress damages should not have been awarded because his conduct was not egregious, the evidence did not support such damages, and the damages claim had been waived or precluded by evidentiary rulings. BIO at 2-3.

Sternberg's effort to tailor his argument against emotional distress damages in view of the broad *Dawson* holding does not alter the fact that the court below reaffirmed and relied directly on that holding in response. In the face of such a clear ruling, there is ample precedent for advancing a new, broader argument to this Court, including that existing precedent should be overruled, where, as here, the new argument supports its consistent claim. *See Citizens*

United, 130 S. Ct. at 893; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).[2]

Johnston incorrectly cites Sternberg's response to Johnston's en banc petition, to suggest that Sternberg conceded that the Ninth Circuit opinion on emotional distress damages was proper and did not create an intra-circuit split. BIO at 3 (quoting Appellants' Answer to Petition for Rehearing en Banc ("Appellants' Answer"), *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010) (No. 08-15721), at 2). Sternberg's response brief addressed only the attorneys' fees ruling, with no mention whatsoever of emotional distress damages. The only issue presented in Johnston's petition for rehearing was whether "the Panel properly determine[d] the recovery of attorney's fees recoverable under 11 U.S.C. § 362(k)(1)." Appellants' Answer at 1.

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[2] Even when a petitioner fails to press an issue below, certiorari may be appropriate when the court of appeals has passed on an issue that is "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (internal citations and internal quotation marks omitted); *cf. Verizon Communs.*, 535 U.S. at 530 (noting that certiorari is appropriate when the court of appeals passes on a "significant issue," even where a party waived the issue).

2. The Circuits Are Indeed Split Over Emotional Distress Damages Under 362(h).

Respondent says nothing about the 109 decisions of lower courts struggling with the split of authority over whether mandatory Section 362(h) "actual damages" include compensation for emotional distress. Lower courts interpret *Aiello v. Providian Fin. Corp.*, 239 F.3d 876 (7th Cir. 2001), to preclude an award of emotional distress damages, and interpret *Dawson* and *Sternberg* to require such damages whenever a reasonable person under the circumstances would suffer significant emotional harm. *Dawson*, 390 F.3d at 1150; Pet. App. 102-27. As confirmed by the *amicus* brief of the American Bankers Association, there is a real circuit split and a real problem that should be addressed now, not later.

Johnston does not contest that the Ninth Circuit below expressly followed and reiterated its previous *Dawson* ruling that emotional distress damages are recoverable, even if the stay violation was not egregious, and despite the lack of corroborating evidence. *Sternberg*, 595 F.3d at 943, n.1. Johnston likewise does not contest that the First and Fifth Circuits presume that emotional distress damages for automatic stay violations are permissible under Section 362(h) where there is "specific information" about the distress rather than "generalized assertions." *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999) (described as *dicta* in *In re Torres*, 432 F.3d 20, 28-29 (1st Cir. 2005)); *In re Repine*, 536 F.3d 512, 521-22 (5th Cir. 2008).

The Seventh Circuit flatly disagrees with these interpretations of Section 362(h), and says that the protection of the automatic stay "is financial in character" and was not drafted "to redress tort violations." *Aiello*, 239 F.3d at 879-80. The Seventh Circuit's theoretical musing that, in extreme cases of extortion or intimidation coupled with financial injury, the bankruptcy court might use equitable doctrines to top off relief under Section 362(h) with state tort law causes of action, *id.* at 879, does not suggest that such relief would *ever* be available under Section 362(h).

Indeed, Respondent acknowledges that "*Aiello* did not squarely hold that emotional-distress damages are recoverable when accompanied by financial injury," and that it "merely speculated" about the availability of such damages under the "clean up" doctrine as "theoretical possibility." BIO at 5. The express recognition that emotional distress damages might be possible if one "hitches" a tort cause of action to a Section 362(h) claim proves that such relief is not available in the Seventh Circuit without the exercise of supplemental jurisdiction to add it. *Aiello*, 239 F.3d at 880. Such relief is clearly unavailable in the Seventh Circuit under Section 362(h) itself.

The Ninth Circuit initially followed *Aiello*, then rejected it on reconsideration. *Dawson v. Wash. Mut. Bank, F.A. (In re Dawson)*, 367 F.3d 1174, 1180-81 (9th Cir.), *rev'd*, 390 F.3d 1139 (9th Cir. 2004). The circuit split is cleanly and sharply defined, and is

very unlikely to end without this Court's intervention.

3. Resolution By This Court Is Urgent.

The "cottage industry" of stay violation damages litigation with websites trumpeting damages awards and settlements needs to end. *See Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 11-12 (B.A.P. 9th Cir. 2002); *www.StayViolation.com*. Debtors and their counsel recognize emotional distress damages claims as a common and easy source of money, since any inadvertent or good faith stay violation is compensable and no medical treatment is necessary. *See Aiello*, 239 F.3d at 880 (claims of emotional distress are easy to manufacture). If the Court delays acceptance of certiorari, many creditors, including agencies of the United States government such as the Internal Revenue Service, Social Security Administration, Department of Veterans Affairs, and the Department of Education, will be forced to pay damages that the law does not allow and expend resources litigating countless emotional distress claims that should be dismissed at the outset. The problem continues to fester and escalate as the volume of bankruptcy filings increases.

4. The Decision Below Is Wrong.

Neither the language of Section 362(h) nor the historical record surrounding its enactment supports the position of courts that allow the award of

emotional distress damages. The Ninth Circuit opined that the statute was enacted in part to address "the emotional and psychological toll" of a stay violation. *Dawson*, 390 F.3d at 1148. Rather, Section 362(h) was enacted to provide a statutory remedy for automatic stay violations that were historically handled through contempt actions, at a time when the jurisdictional ability of bankruptcy courts to order contempt had been called into question. There is no evidence that Congress intended to change the historical unavailability of emotional distress damages in contempt proceedings, or to create a cause of action or remedy not generally available at common law for torts associated with wrongful debt collection. Petition at 18-21.

Respondent simply does not address these issues, and he does not dispute the previous holdings of this Court that damages awards under statutes that protect financial interests rather than human dignity and reputations do not authorize emotional distress awards, or that the Bankruptcy Code is primarily designed to adjust economic interests. He says nothing about debtors using the stay not as a shield but as a sword to extract damages awards in the event of any good faith, inadvertent stay violation, or about the impact of such litigation on the federal government as well as financial institutions and miscellaneous creditors. Petition at 16-17. In short, the brief in opposition does not dispute that the decision below and the Ninth Circuit's *Dawson* holding are wrong.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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